SUPREME COURT, U. S.

No. 963

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,

DONALD F. TURNER,
Assistant Attorney General,

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General,

EDWARD S. SMITH,
Attorney,
Department of Justice,
Washington, D.C. 20530.

BERNARD GELLER,
General Counsel,

HARRY M. PLOTKIN,
Deputy General Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

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OPINIONS BELOW

The opinion of the court of appeals (A. 184–193)[1] is reported at 378 F. 2d 118. The Federal Communications Commission's memorandum opinion and order (A. 146–179) is reported at 4 F.C.C. 2d 612.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1967 (A. 194). The petition for a writ of certiorari was filed on July 13, 1967, and was grant-

[1] "A." refers to the printed appendix filed in this Court under Rule 36(1).

ed on October 23, 1967.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the status quo pending a hearing to determine the impact on local "free" television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b), are set forth in the Appendix to this brief (*infra*, pp. 57–61).

STATEMENT

This case arises out of an order of the Federal Communications Commission (A. 146, 172–175) requiring respondents, operators of three community antenna television (CATV) systems in San Diego, California, to limit the growth of their systems insofar as they carry Los Angeles television signals into San Diego while the Commission conducts a hearing

[2] Certiorari was also granted in No. 428, this Term, on that date. Petitioners in that case—Midwest Television, Inc., *et al.*—seek review and reversal of the same Ninth Circuit judgment.

to determine whether their further expansion would have an adverse effect on "free" television service in San Diego. The Commission acted under a comprehensive set of rules it had recently adopted to regulate the providing of television broadcast signals by CATV systems (A. 73–83, 128–131). The court below set the order aside on the ground that the Commission had no statutory power to issue such interim orders since CATV systems are not licensees over which the Commission has been given regulatory authority by Congress (A. 184–193).

A CATV system picks up television signals by means of high antennae, located at a point of good reception, or by microwave transmission, amplifies and carries the signals received into a community by means of cable or microwave, and then distributes them by cable, generally strung on telephone or utility poles, to the homes of individual subscribers who pay a monthly fee and, commonly, an initial installation charge.[3] The systems generally carry local stations and also can furnish to subscribers the signals of distant stations which could not otherwise be received

[3] The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 C.F.R. 74.1101(a), 2 F.C.C. 2d at 801 (A. 77).

directly off the air by home receivers. In the Commission's view, this extension of signals directly affects its basic plan for allocating "free" television service throughout the United States.

1. THE COMMISSION'S NATIONWIDE TELEVISION ASSIGNMENT PLAN

Section 1 of the Communications Act of 1934 charges the Commission with the duty to "make available, so far as possible, to all the people of the United States, a rapid, efficient, Nationwide and world-wide wire and radio communication service" (47 U.S.C. 151). In aid of this general purpose, the Commission is directed to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (Section 307(b), 47 U.S.C. 307 (b)), and is authorized, "as public convenience, interest or necessity requires," "to establish areas and zones to be served by any station" (Section 303(h), 47 U.S.C. 303(h)).

Pursuant to these responsibilities, the Commission in 1952 adopted a revised nationwide table of television channel assignments, which allocates the use of the available television channels to various communities throughout the country (47 C.F.R. 73.606).[4] The Commission specifically rejected proposals premised on the theory that channel assignments should be clustered in major population centers with smaller com-

[4] Sixth Report and Order in Docket Nos. 8736, *et al.*, 17 Fed Reg. 3905.

munities obtaining reception service solely from the larger cities. 17 Fed. Reg. 3905, 3913. Instead, the table of assignments was designed to maximize the number of individual communities which can have at least one local station, as well as to provide multiple service to as many communities as possible. To this end, seventy UHF (ultra high frequency) channels (14–83) were added in 1952 to the twelve VHF (very high frequency) channels (2–13) which previously had been available for television broadcasting. In most large communities the Commission assigned both VHF and UHF channels. However, the UHF channels were not used as extensively as was expected, particularly where assigned to a community already served by VHF channels, in large part because existing television receivers were not physically capable of receiving UHF signals.[5]

To eliminate this obstacle and help foster the development of UHFs, Congress in 1962, at the Commission's suggestion, adopted "all-channel" receiver legislation (76 Stat. 150, 47 U.S.C. 303(s)) which authorized the Commission to require that all television sets shipped in interstate commerce be equipped to receive "all frequencies allocated by the Commission to television broadcasting." Indeed, the stated

[5] See, *e.g.*, *Second Report on Deintermixture*, 13 Pike & Fischer R. R. 1571; *Jacksonville Journal Co.* v. *Federal Communications Commission*, 246 F. 2d 699 (C.A.D.C.). As of June 3, 1961, only 75 of the 1543 UHF channel assignments were in use, and only 65 cities in the United States were served by three or more television stations. See Notice of Proposed Rule Making in Docket No. 14229, 26 Fed. Reg. 7282.

purpose of this enactment was to promote multiple local television service through use of the UHF portion of the frequency spectrum. H. Rep. No. 1559, 87th Cong., 2d Sess., p. 3. Congress viewed UHF as "not only the best but the only practical way of achieving an adequate commercial and educational television system in the United States." H. Rep. No. 1559, 87th Cong., 2d Sess., p. 4; S. Rep. No. 1526, 87th Cong., 2d Sess., p. 7. This statutory authorization was promptly acted upon by the Commission (27 Fed. Reg. 11698), and all television sets shipped in interstate commerce have, since April 30, 1964, been equipped to receive UHF as well as VHF signals. Considerable stimulation of UHF station growth has occurred as a result of this legislation, but its full potential still remains to be realized (see *infra*, pp. 13–14).

2. THE GROWTH OF CATV SYSTEMS

Community antenna television (CATV) systems have been in existence in this country since the early 1950s. They were originally developed to bring television to remote areas not reached by any television station and to afford multiple service to areas receiving only a limited number of signals. Such factors as distance from originating stations, intervening mountains or other high obstacles, and seasonal or other changes in atmospheric conditions, can impair or make impossible good television reception by ordinary, off-the-air means. Where such conditions prevail, high antennae have been erected at suitable locations, usually on a mountain or other high elevation where reception of the signals of the desired stations is

good. The signals are amplified to insure delivery of signals of acceptable strength, and are distributed by microwave or cable to the community, where they are then carried by cable to the homes of individual customers. At the subscriber's home the incoming cable is attached directly to the receiving connection of a regular television set.

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve-channel capacity, and a twenty-channel and greater capacity is being projected for systems in the near future. The latest estimates place the number of systems in existence at over 1,800, with some 1,600 additional systems franchised but not yet in operation, and over 2,400 applications pending in some 1,200 communities. The distances over which signals are carried has also greatly increased, to as much as 600 miles. Along with the general growth of CATVs, there has occurred, starting in the early 1960s, a rather rapid change in the focus of attention of community antenna system operators. From its inception in simply providing television signals to unserved or underserved areas, CATV development shifted its major emphasis to areas already receiving at least some off-the-air signals of good technical quality. Franchises are being sought, and indeed have already been obtained, in large communities which already receive three or more channels (A. 47–50).[6] CATV

[6] See Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (1965); *32d Annual Report of the Federal Communications Commission*, pp. 85–89 (1966).

systems are thus operating or intend to operate in some of our largest cities; in such areas their function is to provide additional or better signals to viewers already receiving multiple service, instead of simply enabling reception of at least some signals in inadequately served areas.

CATV systems have been largely unregulated at the State level. By 1965 only two States, Nevada and Connecticut, had decided to undertake such regulation. Most systems do, however, operate under franchises issued by local governmental authorities. A wide variance exists in the degree of regulation exerted, but typically a franchise arrangement specifies standards with respect to the construction of the system, the stringing of wires, etc. and contains provisions relating to exclusivity, payments to the municipality and duration of the franchise.[7] Not only has State and local regulation of CATV development been quite disparate; it has not—and indeed cannot—address itself to the broader aspects of CATV impact on the nation's television system.

As CATV systems developed, the Commission became concerned that the loss to local stations of audience and advertising, resulting from the importation by CATV systems of the signals of other distant television stations, might adversely affect the maintenance and development of the basic "free" system of television broadcasting provided in the nationwide assignment plan (*supra,* pp. 4–5). In the Commission's view, CATV does not provide a satisfactory substitute for "free" off-the-air service because it is avail-

[7] Seiden, *supra*, pp. 44–47.

able only to those persons who are willing and able to pay a subscriber's fee and who are within reach of cable facilities.[8] In addition, the Commission took into account the fact that CATV systems ordinarily originate no local programming and thus do not afford an outlet for the expression of local views or the dissemination of news and information of local interest—useful services provided by local stations.

3. THE EVOLUTION AND ADOPTION OF THE COMMISSION'S CATV RULES

In 1958, the Commission began an inquiry to gather data and to examine, among other things, the extent of its own powers to regulate CATV systems. It determined in 1959, as a result of that inquiry, that CATV systems are not engaged in broadcasting and that they are not common carriers. Since the record failed to show a sufficient impact by CATV systems on existing television broadcasting to warrant an assertion of regulatory jurisdiction at that time, the Commission, in disclaiming authority over certain aspects of CATV, chose not to determine whether, on the impact ground, it had jurisdiction over other aspects of this new development in communications. *CATV and TV Repeater Services*, 26 F.C.C. 403, 431.[9]

[8] It has not proved economically feasible to extend CATV service to sparsely populated areas.

[9] The Commission also disclaimed jurisdiction over CATV on certain other grounds. It further held that it lacked authority to deny a common carrier microwave authorization to relay television signals to CATV systems. It reversed this ruling in *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, affirmed, 321 F. 2d 359, 364 (C.A. D.C.), certiorari denied, 375 U.S. 951.

In 1962, the Commission instituted a rulemaking proceeding in which the impact of CATV on broadcasting and the Commission's channel-assignment plan was reexamined in connection with the licensing of microwave relay facilities which serve CATV systems. Since microwave transmissions involve use of the air waves, it is undisputed that the Commission has jurisdiction over such facilities, and, as a result of this proceeding, the Commission concluded that microwave relay facilities serving CATVs would be licensed only where it was shown that the CATV systems served had agreed to carry the programs of local television stations (the "carriage" requirement) and would refrain from duplicating such programs by providing identical signals from distant stations (the "non-duplication" requirement).[10] In the course of this lengthy and comprehensive rulemaking proceeding, the Commission invited and carefully considered the views of all affected parties. Elaborate economic studies prepared under the auspices of the National Association of Broadcasters and the National Community Television Association were submitted, and, in addition, an economic consultant was engaged by the Commission to analyze the issues posed by the development of CATV and to submit his recommenda-

[10] See also *Carter Mountain Transmission Corp., supra*, where, after an evidentiary hearing, the Commission found that the sources of revenue essential to the local television station would be substantially eliminated by the unrestricted growth of CATV systems in the area. To prevent the demise of the local station the Commission refused to grant licenses for a microwave facility to serve the system unless carriage and non-duplication measures were adopted to lessen the impact on that station.

tions.[11] At the conclusion of the proceeding the Commission found that the carriage and non-duplication requirements were necessary to ameliorate the adverse impact on existing and potential television service and were at the same time "appropriate as means designed to create reasonably fair and open conditions for competition between CATV and broadcasting stations as alternative ways of making television programs available to the public." First Report and Order, 38 F.C.C. 683, 713.

Simultaneously, on April 22, 1965, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 30 Fed. Reg. 6078, 1 F.C.C. 2d 453, proposing to assert jurisdiction over all CATV systems, whether or not they use microwave relay to distribute the signals they provide, and to regulate the entry of CATVs carrying "outside" or distant signals into the major markets. Parties who were urging the adoption of rules to govern CATV systems pointed to the explosive growth of CATV operations and contended that further unregulated CATV development would, by fragmenting the available audience, endanger both local "free" television service and the development of multiple television service utilizing both VHF and UHF channels in the larger communities.

On March 8, 1966, after receipt of voluminous comments, the Commission released its Second Report and Order in Docket No. 15971, in which it adopted new

[11] Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (1965).

final rules relating to the regulation of CATV systems (31 Fed. Reg. 4546, 2 F.C.C. 2d 725; A. 1–96). Upon a comprehensive consideration and discussion of its jurisdiction and the bases of its action, the Commission concluded that it has jurisdiction over all CATV systems, whether microwave or cable (A. 4–10, 69–73); found that it was appropriate—and necessary in the public interest—to assert its jurisdiction at that time (A. 10–21); promulgated final revised rules requiring the carriage of local television stations (A. 28–32) and non-duplication (A. 23–28) of their signals; adopted a rule providing for hearing procedures to explore the impact of CATV operations, particularly the importation of distant signals, in the 100 major television markets, including provisions for maintaining the status quo pending an evidentiary hearing (A. 46–59); and stated that there were certain areas of concern which would be dealt with on an *ad hoc* basis (A. 40).

The Commission held that it had statutory jurisdiction over non-microwave CATV because it constitutes interstate communication by wire (47 U.S.C. 152(a), 153(a)) which physically intercepts and extends television signals, and, by so doing, directly affects and may undermine the channel-allocation plan for off-the-air local television service, including UHF stations, established by the Commission under the Act. Thus, the Commission determined, CATV systems, whether microwave or not, are subject to its regulatory powers (47 U.S.C. 154(i), 303(f), 303(r) and 312(b)).

In arriving at this conclusion, the Commission

noted that Congress in the 1962 all-channel receiver legislation had made the judgment that the widest possible development of UHF is the best way of achieving adequate national television service, comprised of a large number of local stations, including both commercial and educational stations (A. 46). It also noted that new UHF stations, particularly independent (*i.e.*, non-network) stations in communities with multiple television service, faced a difficult road in this crucial period in UHF development (A. 50). CATV systems might have a significant adverse effect on such stations by bringing into their communities the non-network programming of independent stations from cities such as New York and Los Angeles. This could fragment the local station's already limited audience, and thus impair its ability to earn advertising revenues and to serve the local community (A. 50–51). And CATV systems, the Commission noted, unlike the local stations, have not traditionally paid for the programming they provide, giving them a competitive advantage over UHF and independent stations (A. 54–56).[12] The Commission found that since UHF development was already proceeding in at least 163 communities or areas—most of which

[12] In the Second Report and Order the Commission noted that it might be necessary to revise certain of its CATV rules in the light of pending developments with respect to the copyright laws (A. 44–45). Proposals for legislation relating to CATV copyright liability are presently pending in Congress, and the question of such liability under the existing copyright laws is involved in *United Artists Television, Inc.* v. *Fortnightly Corp.*, 377 F. 2d 872 (C.A. 2), certiorari granted, December 4, 1967, No. 618, this Term.

were located within the top 100 television markets—any halt or curtailment of the growth of UHF development caused by the importation of signals from other areas into these communities by CATV systems would be particularly significant, for they contain about 90 percent of the television homes in the country (A. 48, 59).

Several other factors which "might lead to results inconsistent with the public interest" also motivated the Commission to assert jurisdiction over CATV (A. 51). As the Commission pointed out, CATV systems cannot economically extend their lines to rural areas, do not generally serve those who cannot afford its monthly fees and installation charges, and do not presently offer a forum for the expression of views on matters of local interest (A. 51). By potentially impairing the viability of "free" local broadcasting in a community, CATV might reduce or deny television service to many viewers.

However, the Commission concluded "that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets" (A. 49). It stated (A. 52):

> * * * [W]e have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly ex-

> plored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and most effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

It therefore determined that there should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system extending signals from beyond the Grade B contour [13] of the originating station into the Grade A service area of any station located in one of the country's largest 100 television

[13] A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. A Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 per cent of the locations. See *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 515–516 n. 12 (C.A.D.C.).

markets.[14] Section 74.1107 of the rules was adopted to effectuate this determination (A. 80–81). Subsection (d) of that rule provides that the general prohibition does not apply to any signal which was being supplied by a CATV system to its subscribers on or before February 15, 1966.[15] However, this "grand-

[14] The Commission left the question of the importation of distant signals into markets other than the top 100 for resolution upon specific complaint, stating (A. 59):

"Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the Grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the non-duplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. It would appear that network programing will continue to be available in such markets; in the unlikely event that such programing becomes unavailable because of CATV impact, there would appear to be other appropriate remedial action which can be taken. Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution. Indeed, the market division which we adopt is really a division between CATV in its traditional sense and the new, revolutionary facet of CATV, as posed by its entry into the major markets. It is the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing."

[15] On February 15, 1966, the Commission had released a public notice in which it announced that new rules would shortly be adopted to apply to non-microwave CATV systems as well as those using microwave, and announcing that February 15 would be the "grandfathering" date (see A. 60–61). Indeed, one of the Commission's concerns, in fashioning its CATV rules, was to avoid disruption of the viewing habits of CATV subscribers (see A. 23).

father" clause is subject to the proviso that such a CATV system shall not extend its service into "new geographical areas" if the Commission finds, upon petition filed by a television broadcast station in the area, that such extension of service is contrary to the public interest. Provision is also made for special situations calling for temporary relief (Section 74.1107(d)):

> [T]he Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

The purpose of this provision for interim relief against the expansion of existing systems was to effectuate the Commission's belief that an existing CATV system "should [not] be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution [in an evidentiary hearing] of the serious issues presented" (A. 61).

Finally, recognizing that in this new and rapidly developing field it could not deal in advance with every potential area of concern, the Commission, in Section 74.1109 of the rules (A. 81–82), made provision for special situations which would justify relief from the requirements of the rules or which would require imposition of "additional or different require-

ments" on an *ad hoc* basis. Here again temporary relief to maintain the status quo pending an evidentiary hearing was authorized.

Although the rule concerning CATV entry into the major markets related only to the extension of a signal beyond the Grade B contour of the originating station, the Commission also directed itself to the situation where two major markets are so located that the Grade B contour of a station in one already penetrates the other. The Commission recognized that the same problems may exist in such a situation as in the case where there is no such penetration, and it decided to deal with such situations on an *ad hoc* basis (A. 62, n. 69):

> If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

In adopting these rules the Commission stressed that what it sought was an accommodation between the legitimate claims of CATV systems and the television stations that would serve the overall public interest in

encouraging "the larger and more effective use of radio" (47 U.S.C. 303(g)). Thus, notwithstanding certain inhibitions on CATV development which the rules impose, the Commission pointed out that CATV systems remained completely free to perform what theretofore had been their primary function—bringing new service to underserved areas and improving the quality of existing service in other localities. And where restrictions were imposed, as for example on the importation of distant signals into major markets, the rules contain no outright prohibition but only seek to delay development and further encroachment until "a full exploration of the facts of each case" has been conducted (A. 62–63).[16]

4. THE PRESENT CASE

Respondents operate three CATV systems in San Diego, California, the 54th largest television market in the United States. They have grandfather rights under the Commission's rules and presently carry the signals of between six and eight Los Angeles television stations into various sections of San Diego. San Diego has two VHF television stations (KFMB–TV

[16] Commissioner Bartley dissented on the ground that the Commission lacks jurisdiction to regulate non-microwave CATV; Commissioner Loevinger expressed doubts as to jurisdiction, but joined in the adoption of the rules; Commissioner Cox, on the other hand, favored even stronger regulation, and thus dissented in part from the substantive provisions of the duplication and distant signal rules (A. 84; 95–96; 84–95). Subsequently, the Commission denied petitions for stay of its rules (A. 97–110, 3 F.C.C. 2d 816), and, except for perfecting modifications, denied petitions for reconsideration (A. 111–145, 6 F.C.C. 2d 309).

and KOGO–TV) (CBS and NBC, respectively), and one independent UHF station (KAAR). A construction permit has also been issued for another UHF station (KJOG–TV), and an application is pending for an educational UHF station.[17]

Midwest Television, Inc., licensee of KFMB–TV, filed a petition with the Commission under Section 74.1107(d) of the rules alleging that respondents were expanding rapidly into new geographical areas, that the viability of local television was being threatened, and that this expansion should be limited. The permit holder for the UHF station to be constructed supported the petition. Respondents claimed that they were not extending Los Angeles signals in violation of Section 74.1107 because San Diego is within the Los Angeles stations' Grade B contour, and that in any event respondents' grandfather rights permitted them to expand.

In a Memorandum Opinion and Order released July 25, 1966, corrected by an erratum (A. 146–179; 4 F.C.C. 2d 612), the Commission found this "a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area," so far as the question of the effect of the CATV operations on the growth of UHF was concerned.[18] Under Sections 74.1107 (a) and (d),

[17] The area is also served with ABC network programs by a VHF station in Tijuana, Mexico.

[18] The question of whether the Grade B contours of the Los Angeles stations reach into San Diego was not resolved by the Commission, since the Commission decided that a hearing was needed in any event to resolve the question of the impact of CATV expansion in San Diego. It held that the policy con-

and 74.1109 of its rules, the Commission sought to maintain the status quo in San Diego by directing respondents, pending the hearing, not to carry Los Angeles signals into new geographical areas they were not serving on the grandfathering date, February 15, 1966. Respondents were permitted to extend their systems, but could offer subscribers to the extended systems only San Diego and Tijuana stations. New subscribers in geographic areas where the systems had been operating prior to February 15, 1966, could be offered both Los Angeles and San Diego-Tijuana signals.

Respondents petitioned the court of appeals for review of the interim restriction on expansion of their systems, contending that temporary relief of this kind is not authorized by the Communications Act.[19] The Ninth Circuit set aside the Commission's order insofar as it granted interim relief.[20] More broadly, however, it held that the interim order was not justified by the Commission's general rulemaking authority under Sections 4(i) and 303(r) of the Communications Act (47 U.S.C. 154 (i) and 303(r)) because

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siderations are the same whether or not the Grade B contours of the Los Angeles stations reach San Diego (A. 164–165).

[19] Respondents Trans-Video, Mission and Pacific urged that the Commission lacked jurisdiction to regulate CATV systems, and, in addition, that its regulations violated the First Amendment, and that the rule invoked by the Commission was invalid because it was adopted without adequate notice.

[20] The lower court granted a stay of mandate pending review by this Court, upon condition that a petition for a writ of certiorari be filed by June 13, 1967. By order of June 13, 1967, Mr. Justice Brennan extended the period for filing the petition to July 13, 1967, and it was filed on that date.

those provisions "are to be measured by the Act and its structure and purpose" (A. 188). Citing *Regents v. Carroll*, 338 U.S. 586, the court ruled that the Commission's powers with respect to the regulation of broadcasting are limited to the licensing of stations and related functions, explicitly stating that "sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority" (A. 192). Since non-microwave CATV systems do not involve licensed activities, the Commission, in the court's view, lacked authority to prevent respondents from expanding pending the hearing it had ordered.[21]

SUMMARY OF ARGUMENT

I

Comprehensive powers have been conferred upon the Federal Communications Commission by Congress

[21] After the decision of the court below, respondents moved to terminate the Commission's hearing on the ground that under the court of appeals' decision the Commission is barred from imposing any restrictions or limitations on the operations of their CATV systems. The Commission denied the petition on the ground that, whatever the rationale of the decision and the language of the opinion, the court's judgment was in terms limited to the power to issue interim orders.

In an initial decision issued October 3, 1967, a Commission hearing examiner concluded that the need for restricting the growth of respondents' systems in San Diego had not been established. *Midwest Television, Inc.*, 11 Pike & Fischer R.R. 2d 273. Southwestern thereupon requested the Commission to lift its interim suspension, but the agency declined to do so, pointing out that the examiner's conclusion did not constitute a final determination, that other parties had indicated they would file exceptions and request oral argument and that no showing sufficient to warrant vacation or modification of the earlier order had been made. *Midwest Television, Inc.*, 11 Pike & Fischer R.R. 2d 721.

to enable that agency to deal effectively with new developments in the continuously evolving uses of radio. These sweeping powers clearly comprehend Commission jurisdiction to regulate community antenna television systems in the public interest. The Communications Act applies to "all interstate and foreign communication by wire or radio * * *." CATV systems receive signals from distant stations, amplify them and transmit them by wire to the home receivers of their subscribers. They are thus clearly engaged in interstate communication by wire, and are therefore subject, under the Act, to Commission regulation.

Moreover, in intercepting and extending television signals, CATV systems directly affect the allocation of television service established by the Commission in carrying out its responsibility to prescribe areas or zones to be served by new stations, and to provide a sound, efficient and equitable distribution of radio service among the States. Since their activities directly impinge upon broadcasting, CATV systems are subject to the Commission's broad regulatory authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." Contrary to the view of the court below, the Commission's powers are not confined to licensing and common carrier regulation. Rather, those powers extend to all persons subject to the Act whose activities directly relate to and affect broadcasting. CATV systems plainly fit into that category.

There are only a limited number of very high frequency (VHF) channels available and the Commission has looked to the more numerous ultra high frequency channels (UHF) to supply local television requirements. Congress endorsed this approach when it adopted all-channel receiver legislation in 1962 to encourage UHF development. Because CATV may fragment a local station's audience, thus impairing its ability to earn revenues and threatening its viability as a broadcaster serving the local community, the Commission concluded that CATV has the potential for changing the entire pattern of television broadcasting. But neither the Commission nor the industry has yet been able to predict what effect this new development will actually have on "free," off-the-air television. Recognizing that the growth of CATV, particularly in the large cities, poses substantial problems of considerable significance to the public interest which must be thoroughly explored, the Commission has asserted jurisdiction in a manner which will permit it to study in detail the potential impact of CATV in particular markets and to preserve the status quo while engaged in that task.

In view of its sweeping statutory powers, it was not necessary for the Commission to find specific mention of CATV in the Act or catalog it as broadcasting or common carrier service. For the Communications Act established a flexible regulatory scheme designed to solve future problems. Congress deliberately conferred on the Commission the authority to deal with rapid and novel technological developments in the communications industry. This

sort of approach is correctly reflected in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* C.A.D.C., No. 20,274, decided June 30, 1967 (Pet. App. D 67–80), which, in upholding Commission jurisdiction over CATV, conflicts with the Ninth Circuit's decision in the instant case. Similar agency authority had been found by this Court to exist in other areas of comprehensive federal regulation. Nothing in *Regents* v. *Carroll,* 338 U.S. 586, relied on by the court below, is to the contrary. There the court simply stated in passing that the Commission's remedial powers under the Act centered on its licensing functions. This observation, made in a case which is plainly distinguishable as a factual matter, hardly should be read as preventing the Commission from regulating a form of interstate communication by wire which significantly extends the signals of licensed stations and thus has a direct effect on the Commission's plan for the allocation of television service in this country.

II

The Commission's broad authority to regulate CATV systems incorporates all that is necessary to prevent frustration of the Act's purposes. That authority necessarily includes, therefore, the power to maintain the status quo in particular markets while the Commission studies, on an *ad hoc* basis, the potential impact of CATV importation of signals from distant stations. To control the expansion of systems without grandfather rights in the top 100 television markets, the Commission has sought to preserve the status quo by general rule. In special situations, such

as presented here, it has adopted a flexible, *ad hoc* procedure which achieves precisely the same result it could obtain by general rule. But rather than impose in all cases a general stay on expansion, to which CATV systems must seek exception, it has left CATV systems like those of respondents free to expand subject only to a finding, after complaint and notice, of the need for a particularized stay in the particular market.

Contrary to the view of the court below, the fact that the Commission has statutory authority to issued cease-and-desist orders (47 U.S.C. 312) against licensees is not of significance here. A cease-and-desist order is permanent in nature, issues only after an evidentiary hearing results in the finding of a violation, and would not be effective to maintain the status quo pending Commission exploration of the potential impact of CATV expansion in a particular market. Nor is interim relief of the kind here ordered analogous to a temporary cease-and-desist order issued to preserve the status quo pending adjudication of an alleged violation. Interim stays are here imposed only to stabilize a rapidly changing situation while the Commission explores what action, if any, should be taken.

Finally, the situation here is quite unlike that where an agency with significantly more limited powers must apply to the courts under the All Writs Act for interim relief. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. Unlike the Federal Trade Commission Act involved in *Dean Foods*, the Communications Act confers comprehensive regulatory power on the Commission. As in *R. A. Holman Co.* v. *Securities and Exchange Commission*, 299 F.

2d 127 (C.A.D.C.), certiorari denied, 370 U.S. 911, the Commission has authority, upon a reasonable balancing of public and private interests, to prevent possible injury to the public while it considers the appropriate standard for conduct in a regulated industry. Whether achieved by general rule or *ad hoc* order, the result is the same—CATV systems cannot expand in certain areas until the Commission has had an opportunity to determine whether such expansion would be in the public interest. Such flexibility in remedies is of the very essence of the regulatory authority conferred on the Commission by the Communications Act of 1934 and is critical to the effective performance of its responsibilities. Any other approach would run a serious risk of rendering Commission regulation of CATV nugatory, by presenting the agency with a *fait accompli,* resulting from the expansion of systems during the pendency of hearings, which could not, as a practical matter, be undone.

ARGUMENT

The scheme of regulation created by the Communications Act of 1934 was designed to meet new developments in the continuously evolving uses of radio and television. CATV is such a development. Because it physically intercepts and extends television signals, it forms a link in the nation's television system and has a direct impact on the community-oriented pattern of channel allocations established by the Commission in the public interest. But the rapid growth of CATV systems, particularly in metropolitan areas, presents novel problems. Neither the Commission nor

the industry has yet been able to estimate fully what the effect of this new development on broadcasting will be. Accordingly, the Commission has endeavored not simply to preserve the existing plan for local broadcasting, but to study in detail the impact CATV may have in particular important markets. The general regulations it has adopted and their application in this particular case so as to maintain the status quo pending consideration of the situation in the San Diego market, rest upon the same statutory basis—the flexible, comprehensive and expansive powers which Congress delegated to the Commission in the Communications Act of 1934 in order "to promote and realize the vast potentialities of radio * * *." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217; see *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203.

I. THE COMMUNICATIONS ACT OF 1934 CONFERS AUTHORITY ON THE COMMISSION TO REGULATE COMMUNITY ANTENNA TELEVISION SYSTEMS

Once the nature of CATV and its potential impact on broadcasting is comprehended, it is virtually self-evident that the administrative agency charged by Congress with the regulation of broadcasting, and endowed with sweeping authority to perform that function, has jurisdiction to regulate this new and significant development in the communications field.[22]

[22] Indeed, the Commission's authority to regulate CATV systems derives from some of the same statutory sources as its authority to establish and administer a nationwide plan for the allocation of television channels to various communities across the country. See *Logansport Broadcasting Corp.* v. *United*

The statutory basis for Commission jurisdiction over CATV systems can be succinctly expressed: CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(e)) since the systems physically intercept and extend television signals. By so doing, they directly affect and threaten to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303 (h) and (s), 307(b)). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303 (f) and (r), 312(b)).

Congress's purpose to include within the scope of the Communications Act all forms of interstate communication by wire or radio, then existing or subsequently developed, is indisputably clear. Section 2(a) (47 U.S.C. 152(a)) expressly declares that the Act's provisions "shall apply to *all* interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio * * *" (emphasis added). CATV systems come squarely within this language. They are plainly engaged in interstate communication by wire, for that term includes "the transmission of * * * signals, pictures, and sounds of all

States, 210 F. 2d 24 (C.A.D.C.). There can be no question as to its jurisdiction to condition the licenses of microwave relay systems designed to serve CATVs on the meeting of certain requirements in order to protect the integrity of this plan. See, *e.g.*, *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951; *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.). And there is no significant distinction in effect on the channel-allocation plan between a CATV system served by a licensed microwave relay, and a system which captures the unrelayed signals of licensed television stations directly from the air waves.

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kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission" (47 U.S.C. 153(a)).[23]

CATV systems operate in interstate commerce, as part of the continuous stream of interstate communications. They often receive programs which originate in other States, amplify them and transmit them to the home receivers of their subscribers. Moreover, the fact that some systems might be located and receive signals from within a single State would not serve to defeat the Commission's jurisdiction. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* C.A.D.C., No. 20,274, decided June 30, 1967; *Idaho Microwave Inc.* v. *Federal Communications Commission,* 352 F. 2d 729 (C.A.D.C.). Cf. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266; *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U.S. 650.[24] CATV systems, as the Com-

[23] See also 47 U.S.C. 153(b), which defines a "radio communication" as "the transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission." Although the Commission determined that CATV systems were engaged in interstate communication by wire, it also stated, in the Second Report and Order (A. 70, n. 1), that "[s]ince CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential" to resolution of the jurisdictional question. CATV systems are plainly "incidental" to the transmission of radio communications, and could have been found subject to the regulatory authority of the Commission on this ground as well.

[24] See also *California Interstate Telephone Co.* v. *Federal Communications Commission,* 328 F. 2d 556 (C.A.D.C.); *Ward*

mission found, cannot properly be analogized to passive roof-top and backyard aerials (A. 56). CATV facilities consist of tall antennae linked with miles of cable and sophisticated receiving and amplification equipment. Both technically and commercially they constitute communications systems separate and apart from the home receivers they serve.

CATV operations directly affect the allocation of television service established by the Commission in carrying out its responsibility "as public convenience, interest, or necessity requires" (47 U.S.C. 303) "* * * * to establish areas or zones to be served by any station" (47 U.S.C. 303(h)); and to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)). *Logansport Broadcasting Corp.* v. *United States,* 210 F. 2d 24 (C.A.D.C.). To implement these statutory provisions, the Commission adopted a table of channel assignments aimed at providing television broadcast stations in as many communities as possible. It established a system of priorities to guide its assignments [25] and took into account geographical,

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v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), certiorari denied, 371 U.S. 820.

[25] As set out in the Sixth Report and Order in Docket Nos. 8736, *et. al.*, 17 Fed. Reg. 3905, 3912, these priorities are:

Priority No. 1: To provide at least one television service to all parts of the United States.

Priority No. 2: To provide each community with at least one television broadcast station.

Priority No. 3: To provide a choice of at least two tele-

economic and demographic conditions. 17 Fed. Reg. 3905, 3912. Because the number of available VHF channels is quite limited, the Commission looked to the more numerous UHF channels (14–83) to supply local requirements. Congress endorsed this approach when it adopted the all-channel receiver legislation in 1962 for the specific purpose of encouraging UHF development (76 Stat. 150, 47 U.S.C. 303(s)). See H. Rep. No. 1559, 87th Cong., 2d Sess., pp. 2–6; S. Rep. No. 1526, 87th Cong., 2d Sess., pp. 2–5. The fundamental premises of the channel-allocation plan were that service would be free and directly off-the-air to the home receiver; and that the economic fate of local stations would be determined substantially on the basis of competition for viewers among similarly situated stations.

Broadcasting derives its revenues from advertising. In an economic sense, the "customers" of television stations are not the audience to which they furnish programming, but advertisers who seek to reach the audience which the stations attract. Essential to effective programming which will attract audiences is a reasonable degree of exclusivity for the programs

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vision services to all parts of the United States.

Priority No. 4: To provide each community with at least two television broadcast stations.

Priority No. 5: Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.

broadcast,[26] and exclusivity is an important element in the costs of program material. To the extent that CATV systems decline to carry local stations and duplicate their programming, or import multiple signals from distant stations, they tend to deprive local stations of some of the program exclusivity they need to attract audiences. As audiences are reduced, the local stations may ultimately suffer a serious loss in advertising revenues. CATV therefore has the potential of diluting a local station's audience, thus impairing its ability to earn revenues and threatening its viability as a broadcaster serving the local community. See *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951.

In addition, the Commission has found that CATV at the present time does not normally serve as an outlet for local self-expression or provide programming tailored to local needs (A. 51). The Commission's allocation of television facilities pursuant to Sections 303 and 307(b) of the Act is predicated upon the "desirability of having a large number of local outlets with diversity of control over disseminating sources rather than a few stations serving vast areas and populations" (First Report and Order, 38 F.C.C. at 699–700). It has long rejected, as inconsistent with

[26] The Communications Act provides for some exclusivity by providing that no broadcasting station shall "rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station" (47 U.S.C. 325(a)). This provision does not apply to CATV because, although CATV systems transmit signals, they do not broadcast them. *CATV and TV Repeater Services*, 26 F.C.C. 403, 431.

the congressional design and with the most effective use of the air waves in the public interest, the view that channel assignments should be clustered in major cities from which satellite communities within an appropriate range would obtain service rather than having broadcast facilities of their own (First Report and Order, 38 F.C.C. at 700).

Thus, if the ultimate effect of CATV operations in a major community in fact proved to be the substitution for local independent stations of independents from the very largest cities, like New York or Los Angeles, this would not only be "contrary to sound allocation principles, long established in section 307 (b) of the Act" (A. 51), but also a "clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the 'important needs' for 'local programming and self-expression'" (A. 51). H. Rep. No. 1559, 87th Cong., 2d Sess., p. 3; S. Rep. No. 1526, 87th Cong., 2d Sess., p. 4.

When the signals of stations are extended far beyond their normal broadcasting areas into communities assigned other stations, the fundamental basis of the Commission's channel-allocation plan is endangered. Essential to that plan was a deliberate choice to provide the maximum number of viable local stations. CATV, however, has the potential, if wholly unfettered, for changing the entire pattern of television broadcasting in this country. Several stations might become concentrated in a few large centers from which their signals would be extended by microwave and cable across the country. Had the Commission not

acted when and as it did, the nationwide plan for community broadcasting and the congressional design to achieve this through UHF might have been displaced by technological and economic centralization of television broadcasting in a few large cities, and the whole system of "free" off-the-air television service might thus have been undermined. To a substantial degree, only those financially able to afford to pay monthly CATV charges and in an area where CATV service could economically be provided would have been able, in the wake of the demise of local stations, to receive television service.

It cannot seriously be maintained that the Commission's powers are so limited that it must remain passive while new methods of extending television signals threaten such a disruption of broadcasting patterns. The agency was created to foresee, consider and provide for precisely such developments. Congress was fully aware of the dynamic and unforeseeable potentialities of radio waves. As this Court had occasion to point out, in "the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219; see also *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138.[27]

Congress established the Commission for "the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United

[27] The statutory development of radio regulation and the purposes of the Communications Act are summarized in *National Broadcasting Co.* v. *United States,* 319 U.S. at 210–214.

States a rapid, efficient, Nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *" (47 U.S.C. 151). Its explicit authority to established the allocation of television service (47 U.S.C. 307(b)) is implemented by a specific directive in Section 303 (47 U.S.C. 303) that, "[e]xcept as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * *;

* * * * *

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *."

These provisions are reinforced by further express authorization for the Commission to effectuate its functions. Section 4(i) (47 U.S.C. 154(i)) provides that the "Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." Its power to issue cease-and-desist orders for violations of the Act and regulations thereunder extends to "any person" who has committed a violation (47 U.S.C. 312(b)).

Under this comprehensive statutory scheme, the Commission was not only empowered to consider the

effect of CATV on broadcasting—it had a clear obligation to do so. Upon finding that CATV's undirected growth constituted a threat to the orderly development of television service, it was the Commission's duty, in the public interest, to assert the regulatory jurisdiction exercised here. *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475–476; *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 258 F. 2d 440, 443 (C.A.D.C.).

It was not necessary for the Commission to find specific mention of CATV in the Act. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 218. Nor was it required to catalog CATV as broadcasting (see *CATV and TV Repeater Services,* 26 F.C.C. 403, 431) or CATV systems as common carriers (cf. *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* 359 F. 2d 282 (C.A.D.C.)), in order to exercise its regulatory powers. The comprehensive grants of rulemaking authority are not merely housekeeping provisions. They constitute affirmative grants of power to achieve the purposes of the Act, derived from a reading of the Act as a whole "and with appreciation of the responsibilities of the body charged with its fair and efficient operation." *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203. Such powers are co-terminous with the scope of agency regulation. *American Trucking Ass'ns* v. *United States,* 344 U.S. 298, 309–311.

Moreover, the Commission's assertion of regulatory jurisdiction over CATV, insofar as it affects television broadcasting, is essentially but a particularization of the Act's public interest standards. When another such particularization—the Commission's Chain

Broadcasting regulations—was challenged as going beyond the Commission's powers, this Court held, in rejecting the attack (*National Broadcasting Co.* v. *United States,* 319 U.S. at 219–220):

> * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

Such considerations have been applied in many other contexts. *American Trucking Ass'ns, supra,* involved rules adopted by the Interstate Commerce Commission governing the use by motor carriers of leased and interchanged equipment which was otherwise exempt from Commission regulation. Although leasing practices were not specifically committed by statute to the agency's jurisdiction, the Court sustained the rules under the Commission's general power to

enforce the Act's provisions, recognizing that the specific powers would be meaningless without authority to prevent frustration of the Act's purposes (344 U.S. at 311). A similar approach has been taken in a number of other regulatory contexts.[28] For example, in *Pan American World Airways* v. *United States*, 371 U.S. 296, this Court upheld the authority of the Civil Aeronautics Board to order divestiture even though that power was not expressly set forth in the statute. Observing that "Congress must have intended to give it authority that was ample to deal with the evil at hand," the Court analogized the power of agencies to mold administrative decrees with those of courts to frame injunctive decrees "subject of course to judicial review" (371 U.S. at 312).

All of this was plainly recognized by the District of Columbia Circuit in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission, supra,* which squarely conflicts with the decision below.[29] In *Buckeye,* the Commission issued a cease-and-desist order to compel a CATV system in Toledo, Ohio, to obey the distant-signal rules. On petition for review, the court of appeals held that the Commission has ample power to issue and enforce such rules, and that in

[28] *E.g.*, *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 379 F. 2d 153, 158 (C.A.D.C.) (Section 309 of the Federal Power Act, 16 U.S.C. 825(h)); *American Airlines* v. *Civil Aeronautics Board*, 359 F. 2d 624, 627–628 (*en banc*) (C.A.D.C.), *certiorari denied*, 385 U.S. 843 (Section 204 of the Federal Aviation Act, 49 U.S.C. 1354(a)); *Public Service Commission of New York* v. *Federal Power Commission*, 327 F. 2d 893, 896–897 (C.A.D.C.) (Section 16 of the Natural Gas Act, 15 U.S.C. 717*o*.)

[29] See Pet. App. D, where the *Buckeye* opinion is reproduced.

doing so it had "chosen an eminently reasonable course. The growth of CATV is so rapid that, if it is allowed to proceed unabated, harm to the regulatory scheme can occur before the FCC can act" (Pet. App. D 72).[30]

Conversely, the restrictive approach adopted by the court below—that the Commission's rulemaking powers under Sections 4(i) and 303(r) are limited to broadcast licensees—would defeat the comprehensive purposes of the Act to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)), and "to secure the maximum benefits of radio to all the people of the United States. * * *." *National Broadcasting Co.* v. *United States*, 319 U.S. at 217. As *Buckeye* makes clear, the Commission's powers are not "rigidly compartmentalized into 'licensing' and 'public utility regulation' functions" (Pet. App. D 73, n. 19). See *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Those powers extend, and must necessarily extend, if the Commission is to regulate effectively, to all conduct by persons subject to the Act which, as in the case of CATV, directly relates to and affects broadcasting.[31]

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[30] Only the D.C. Circuit, in *Buckeye*, and the Ninth Circuit, in the instant case, have reached and decided the question of Commission authority to regulate CATV systems. A number of similar cases are pending in various courts of appeals (see Pet. App. G 93–95), and it seems apparent that these courts are disposed to await a decision by this Court in the instant case on the jurisdictional issue.

[31] Nor are the Commission's statutory powers to regulate CATV in any way affected by supposed past disclaimers by

Regents v. *Carroll*, 338 U.S. 586, does not support the restrictive reading of the Act adopted by the court below. In that case a station's license had been renewed on condition that it repudiate a certain contract. That contract provided for the payment of money and had been entered into in lieu of another contract found by the Commission to have effected an improper delegation of control. The station was ordered by a State court to make a payment under the contract. Upon review this Court held that the station's defense of impossibility, based on the condition in its license, was a matter of State law. In the course of its opinion the Court noted that the Commission's remedial powers under the Act as it then stood were centered on its licensing functions. But the *Regents* holding does not in any event "bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory

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the Commission of authority over non-microwave CATV (see *supra*, p. 9) or by its efforts to obtain legislation on the subject from Congress. Not only does the Second Report and Order show that there was no settled administrative construction supporting CATV exemption from Commission control (A. 8–9); even had there been, the Commission, "faced with new developments * * *, may alter its past interpretation and overturn past administrative rulings and practice." *American Trucking Ass'ns* v. *Atchison, T., & S.F. R. Co.*, 387 U.S. 397, 416. And the Commission can hardly be chastised for requesting "congressional guidance as to policy and congressional clarification of [its] authority" in the CATV field (A. 63), or for having done so in the past (see A. 3, 10). If congressional inaction indicates anything, it seems to suggest that Congress is content to allow the Commission to proceed to regulate CATV under its promulgated rules and pursuant to its existing statutory authority.

scheme." *Buckeye Cablevision, Inc.* v. *Federal Communications Commission* (Pet. App. D 73).[32]

It seems plain, therefore, that the statutory powers given the Commission are ample to authorize its regulation of the carriage of television signals by CATV systems. Indeed, that is the only aspect of CATV operations over which Commission authority has been asserted. No attempt has been made to franchise or otherwise regulate entry into the CATV business, nor to fix CATV rates or limit the number of systems which can operate in a particular area. Nor was the Commission's purpose in any sense to undermine the development of CATV. Rather, the Commission noted at several points in the Second Report and Order the beneficial nature of various aspects of CATV service (*e.g.*, A. 21–22, 57), and stressed that "the rules [which it adopted] do not halt CATV service or growth" (A. 62). It was the Commission's purpose to assert jurisdiction over CATV systems, at a time when that assertion could be effective, to give it an opportunity to study the difficult questions of CATV's potential impact on local stations and on television broadcasting

[32] Nor does *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, support the decision below. That case sustained the Commission's authority to interpret 18 U.S.C. 1304, prohibiting the broadcast of lotteries, and to deny a license on that ground, but found that the Commission's definition of a lottery was in part erroneous. This Court's statement that the Commission (p. 289) "would be remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute [Section 1304]," is hardly an indication that the licensing authority over broadcasters is the sum total of the authority over interstate transmissions granted by the Act.

generally. As the Commission pointed out, "[W]e have specified no 'freeze' but rather a full exploration of the facts of each case, so that we may make an informed judgment on this most important question. We believe that this is a reasonable way to proceed, and that the public interest requires no less a procedure" (A. 63; see also A. 4). In short, the Commission simply determined that it had the duty to investigate fully the significance of CATV and determine what mode of regulation, if any, this new development in communications should be subjected to in the future.

Yet, it cannot seriously be questioned, in the light of the Commission's findings, that the problems posed by CATV growth are serious, and that they involve a genuine threat of potential harm to the public interest and possible frustration of congressional goals. Accordingly, the Commission properly concluded that its statutory authority extended to non-microwave CATV and that it should exercise that jurisdiction presently. CATV no doubt can play a vital role in supplementing broadcast service and in bringing television to those areas which might not otherwise enjoy it. In view, however, of the rapid development and possible impact of CATV, the public interest requires that conditions conducive to a sound future "be assured rather than left uncertain." *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. In assuming jurisdiction to regulate CATV, the Commission acted in a proper and timely fashion, and its action is grounded on a solid statutory foundation. Thus, the Ninth Circuit erred in concluding that the Commission's rulemaking authority extended only to

licensees,[33] and therefore did not include non-microwave CATV.[34]

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[33] It might be argued that the Commission's rules in effect constitute licensing of CATV systems. The Administrative Procedure Act defines a license as "an agency permit, certificate, approval * * * or other form of permission" (5 U.S.C. (Supp. II) 551(8)). But the CATV rules do not purport to establish a licensing structure analogous in any sense to that which applies to radio stations pursuant to Title III of the Communications Act. No attempt is made to pass on the qualifications of prospective CATV operators or to assess the adequacy of their proposals in any legal, financial or technical sense. Cf. 47 U.S.C. 308, 309. The Commission's only objective was to assure that the service provided by CATV systems will be consistent with the establishment and healthy maintenance of television broadcast service in the area, a matter clearly committed to Commission concern under the terms of the Communications Act. If, as we have urged, the Commission may regulate the activities of those engaged in interstate communication by wire to the extent necessary to achieve this goal, it makes no difference whether its actions are termed "licensing" or something else.

[34] Any doubt that the Ninth Circuit viewed its decision in the instant case as having reached and resolved the question of Commission jurisdiction over CATV is dissipated by that court's holding in *Valley Vision, Inc.* v. *United States*, C.A. 9, Nos. 21869 and 21870 (order of June 29, 1967). There the court of appeals cited the instant case as sole authority in staying a cease-and-desist order of the Commission against violation of the CATV rules. Since no interim stay order was there involved and the Commission has express authority to issue cease-and-desist orders for violations of its rules (47 U.S.C. 312(b)), it is clear that the Ninth Circuit views the Commission as having no jurisdiction over non-microwave CATV.

II. THE COMMISSION ACTED WITHIN ITS STATUTORY AUTHORITY IN DIRECTING RESPONDENTS TO LIMIT EXPANSION OF THEIR OPERATIONS PENDING ITS CONSIDERATION OF THE IMPACT OF SUCH AN EXPANSION ON LOCAL BROADCASTING

If the Commission has jurisdiction to regulate CATV systems, it seems plain that that authority must encompass all that is necessary to prevent frustration of the Act's purposes. *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311. Power to maintain the status quo during an interim period while the Commission investigates the impact of CATV in particular markets is not merely useful; it is indispensable to effective performance of the Commission's statutory responsibilities. As it pointed out in this case (A. 166): "Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act."

Sections 4(i) and 303(r) contain sweeping grants of authority for the Commission to "make such rules and regulations, and issue such orders" not inconsistent with the Act as it may find necessary in the execution of its functions, and to "make such rules and regulations and prescribe such restrictions and conditions" not inconsistent with the Act "as may be necessary to carry out [its] provisions * * *" (47 U.S.C. 154(i), 303(r)). That such statutory language cannot be read in a niggardly fashion seems clear from prior precedents involving the agency here involved, and from decisions relating to other agencies to which Congress has similarly given an extensive grant of regulatory author-

ity. In *Niagara Mohawk Power Corp.* v. *Federal Power Commission,* 379 F. 2d 153, for example, the D.C. Circuit recently pointed out that "there is no dearth of decisions making clear that [such provisions] are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act" (*id.* at 158).

CATV presents novel problems; neither the Commission nor the industry has yet been able to assess fully the impact which this new development may have on broadcasting. The thrust of the Commission's rules, therefore, is not to prevent the development of CATV but to permit the examination, on an *ad hoc* basis, of its effect on particular markets and on the Commission's allocation of television service throughout the country.[35] It seems plain that " * * * this kind of flexibility and adaptability to changing needs and patterns * * * is an essential part of the office of

[35] In point of fact, the Commission's determination to suspend CATV expansion in the major markets pending hearings and case-by-case determinations is consonant with the congressional policy, as reflected in the Communications Act, of having the agency decide "important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop" (A. 58). Section 319 of the Act (47 U.S.C. 319) is a specific example of that congressional policy, in that it prohibits issuance of a station license unless a construction permit is first secured. Similarly, Sections 301 and 309 of the Act require Commission decision of public interest questions before the broadcasting stations can begin operations (47 U.S.C. 301, 309).

a regulatory agency." *American Trucking Ass'ns v. Atchison, T., & S.F.R. Co.*, 387 U.S. 397, 416.[36] But such an examination could be completely frustrated if CATV systems were to mushroom in the very markets under study while the Commission was proceeding to ascertain the facts and make informed determinations. Unless the status quo is maintained in the interim, the Commission's investigation may be mooted by a *fait accompli*.[37] As the Commission stated (A. 58):

> It is important, we think, to exercise [our] jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of disruption which would result, to take effective action or to attempt to roll back the situation, if it should

[36] Similarly, in *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F. 2d 282 (C.A.D.C.), where the court of appeals upheld as rational and permissible the Commission's determination to regulate CATV systems as adjuncts to the country's broadcasting system rather than as common carriers, it was stated that "the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry" (*id.* at 284).

[37] If the Commission lacks power to maintain the status quo in aid of its jurisdiction over CATV pending a hearing, its only recourse, should it eventually determine that expansion should not, in the public interest, be permitted, would be the quite undesirable and rather infeasible one of requiring removal of already installed systems.

develop or be shown that the CATV operation is inconsistent with the public interest.

The same considerations apply whether the status quo is to be maintained by a general rule (as in Section 74.1107) restricting new franchises in the top 100 markets pending a hearing, or by *ad hoc* rulings tailored under Section 74.1109 to the facts of the particular situation, as in the instant case.

This is precisely the kind of circumstance in which the Commission may proceed either by a general rule or by a particular order.[38] *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; cf. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; *Meredith Broadcasting Co.* v. *United States*, 365 F. 2d 912 (C.A.D.C.); *Law Motor Freight Inc.* v. *Civil Aeronautics Board*, 364 F. 2d 139 (C.A. 1).[39]

[38] See Administrative Procedure Act, 5 U.S.C. (Supp. II) 551; 1 Davis, Administrative Law Treatise, Secs. 5.01, 5.05.

[39] In *Storer*, the Commission adopted multiple ownership rules which limited the number of stations an applicant might own, and dismissed without hearing an application which would have exceeded the limit. The applicant argued that he could not thus be denied the hearing provided by 47 U.S.C. 309; this Court held, however, that under the general rulemaking power conferred in 47 U.S.C. 154(i) and 303(r), the application was properly denied. The applicant's right to a hearing was adequately preserved by the opportunity provided in the rules to apply for a change or waiver upon a sufficient showing (351 U.S. at 202–206).

In *Meredith*, the Commission adopted an interim policy of not passing on applications for stations in the top 50 markets by multiple-station owners above a certain limit, while it considered proposed changes in the multiple ownership rules; its action in this regard was sustained by the court of appeals.

In *Law Motor Freight*, the court held that an order of the Civil Aeronautics Board exempting an air freight forwarder's pickup and delivery service in a particular zone from regula-

Under the Administrative Procedure Act, results reached by the agencies in the foregoing cases could have been accomplished by rulemaking or by adjudication. By the rules prescribed with respect to CATV, the Commission, so far as it found it feasible, adopted an interim stay policy with regard to expansion of systems in the top 100 television markets. For grandfathered systems like those of respondents, however, the Commission refrained from adopting any general prohibition on expansion, but instead determined to ascertain whether an interim stay would be appropriate only after consideration of the particular facts.

There can hardly be any complaint because here the status quo is maintained, not automatically, by operation of law; but rather by special order, entered after notice and upon consideration of the particular circumstances. Stated differently, in the kind of situation here involved the Commission has determined to proceed on an *ad hoc* basis rather than to prescribe by general rule a suspension of system expansion pending a hearing in each and every case. That it could have done so, assuming jurisdiction over CATV generally, seems clear from a consideration of the same statutory sources which suport its general rulemaking powers. That it chose rather to adopt a more flexible procedure, and place the burden on interested persons who fear adverse effects from expansion of existing systems to seek the initiation of an inquiry, seems an eminently reasonable course for the Commission to

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tion under the Federal Aviation Act was rulemaking despite its particularized nature.

follow with respect to the kind of situation presented here—the overlapping of Grade B contours.

After consideration of the pleadings and affidavits of the parties, the Commission concluded that this was a classic case for an evidentiary hearing on the public interest questions posed by the expansion of respondents' systems throughout the San Diego area, and a case falling squarely within the policy of the Second Report and Order (A. 161–162). It was undisputed, the Commission found (A. 162), that there was considerable UHF activity underway in San Diego, that respondents' systems had commenced operations only recently, and that while these systems then had relatively few subscribers, they had the potential to expand throughout San Diego County under franchises covering areas where approximately 90 percent of all the homes within the Grade A contour of the San Diego stations are located.

In further concluding that interim relief appropriately limiting further expansion pending a hearing was necessary, the Commission stated (A. 163):

> Further, unless this expansion is appropriately limited pending resolution of the issues within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until

resolution of the public interests issues is called for.

An interim stay of this kind is not analogous to a cease-and-desist order, and maintenance of the status quo is not imposed as a sanction for violation of the statute or the Commission's rules. Thus, Section 312 of the Act (47 U.S.C. 312), which provides for permanent cease-and-desist orders for violation of the Communications Act or the Commission's rules, is not germane. The court below inferred from the existance of Section 312 that the Commission lacked power to enter an interim order of the kind involved here. Section 312, however, authorizes a sanction for past violations and issues only after a full evidentiary hearing. That critical distinction wholly undermines the reliance of the court below on the Commission's power to issue cease-and-desist orders as a ground for concluding that the Commission lacks the authority to issue interim orders addressed to such a discrete problem. Indeed, a cease-and-desist order would be of little assistance in stabilizing a rapidly changing situation while the Commission has an opportunity to study the matter.

Nor is the question of the agency's power to issue what would amount to a temporary cease-and-desist order, pending adjudication of an alleged violation, presented here. Decisions such as *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Board,* 302 F. 2d 875 (C.A.D.C.), and *Standard Airlines, Inc.* v. *Civil Aeronautics Board,* 177 F. 2d 18 (C.A.D.C.), are thus inapplicable. Those cases involved an attempt by an administrative agency, without express or implied statutory authority, to suspend ongoing activities while an adjudication of an alleged

violation of law was made. See Jaffe, *Judicial Control of Administrative Action*, 662 (1965). And in both cases the agency action in effect rescinded operating authority which had previously been granted by the agency. No such situation exists here. CATV systems were not in any sense given operating authority by the Commission. Moreover, the interim order stayed only further extension of the existing systems, and did not require cessation of any service already being provided by respondents.

If an agency lacks the statutory authority to prescribe an interim stay pending an evidentiary hearing, the agency's only recourse is to apply to a court of appeals for an injunction under the All Writs Act which will preserve the court's jurisdiction to enter an effective order after hearing. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. But the Communications Act, unlike the more narrowly drawn Federal Trade Commission Act involved in *Dean Foods*, itself confers on the Commission authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions" (47 U.S.C. 154(i), 303(f), 303(r)).[40]

A court may apply familiar standards for preliminary relief[41] when asked for an injunction pending a

[40] Moreover, as the Commission observed in this case, an application under *Dean Foods* "would not permit the initial consideration of the matter by the Commission, followed by judicial review, which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission" (A. 166, 177). Not, unlike the Commission, is the FTC the sole body charged by Congress with the administration of the laws in question.

[41] See *Virginia Petroleum Jobbers* v. *Federal Power Commission*, 259 F. 2d 921 (C.A.D.C.).

hearing which will adjudicate a violation of established law or regulations. However, when the agency is not considering a violation, but is attempting to establish, in an evidentiary proceeding, a rule for the conduct of regulated activity in a particular market, the issues are singularly inappropriate for initial judicial consideration. The agency itself must assess the need for maintaining the status quo. Its powers to do so derive from the same statutory sources that enable it to adopt the final rule.

An illustration of the principle is *Amerada Petroleum Corp.* v. *Federal Power Commission,* 293 F. 2d 572 (C.A. 10). There, under provisions similar to the Communication Act's broad grants of regulatory authority, the court sustained the jurisdiction of the Federal Power Commission to bar rate changes to be made effective during the period when prior changes relating to the same service were suspended. Although the Act contained no other restriction against such changes, power to maintain the status quo was inferred from the entire regulatory scheme.

Even where violations are charged, interim relief has been permitted. In *R. A. Holman & Co., Inc.,* v. *Securities and Exchange Commission,* 299 F. 2d 127 (C.A.D.C.), certiorari denied, 370 U.S. 911, interim action by the Commission in suspending a broker's right to deal in exempt securities pending a hearing was sustained under that agency's general regulatory powers. The court noted (299 F. 2d at 131):

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest in-

> fringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. * * *

Of course, as *Holman* indicates, the validity of an interim order depends upon a reasonable balancing of public and private interests. Here the Commission found temporary relief to be necessary to prevent consequences potentially adverse to the public resulting from the unfettered growth of respondents' systems while a hearing was in process. It weighed the effect on respondents of halting their expanded importation of Los Angeles signals against the possible adverse effects continued expansion might have on the San Diego market. Respondents were left free to extend their lines and to enroll new subscribers, subject only to a limitation on their right to import Los Angeles signals into new geographical areas in San Diego. And the Commission's order specifically provided that "if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration" (A. 179).[42]

Assuming Commission jurisdiction over CATV generally, an inability to issue interim stay orders would

[42] On November 14, 1967, the Commision rejected a request by Southwestern to terminate the interim order as to it (11 Pike & Fischer R.R. 2d 721). The Commission found that the request was based largely upon findings of the hearing examiner which were still subject to Commission review, and that Southwestern's financial position seemed to be improving since the date of the original interim stay order.

in effect restrict the Commission to acting only by general rules, the result of which would be to freeze CATV development across the nation. Had the Commission so proceeded, it could have provided, on an *ad hoc* basis, waivers of the application of such general rules to particular CATV systems,[43] such as those of respondents. In an effort to approach the matter in a flexible, commonsense way, the Commission chose instead to limit the scope of the general rules to certain, well-defined situations where the potential impact of CATV was likely to be significant and where no grandfather rights existed. Thus, rather than impose a general stay by rule, to which CATV systems must seek exception, it has left CATV systems such as those of respondents free to expand, subject only to complaints by parties allegedly injured and a finding of the need for a particularized stay in the particular market. Such flexibility in the choice of remedies is of the very essence of the regulatory authority Congress conferred on the Commission. "The Communications Act must be read as a whole and with an appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions." *United States* v. *Storer*

[43] As of November 30, 1967, approximately 320 pleadings have been filed under the Commission's distant-signal rules (Section 74.1107), requesting hearings or waivers, 204 of which are still pending. Under the Commission's "additional or different requirements rule" (Section 74.1109), approximately 553 proceedings have been filed, 271 of which remain pending.

Broadcasting Co., 351 U.S. at 203. Here, we submit, the Commission's actions were authorized by and fully comply with the provisions of the Communications Act.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
Attorney.

HENRY GELLER,
General Counsel,

DANIEL R. OHLBAUM,
Deputy General Counsel,
Federal Communications Commission.

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APPENDIX

COMMUNICATIONS ACT OF 1934

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or

transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

* * * * *

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * *

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

* * * * *

SEC. 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

* * * * *

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or posession of the United States or in the District of Columbia to another place in the same territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United

States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * * * *

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately re-

ceiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

* * * * *

SEC. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

SEC. 312. (b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

SECTIONS 74.1103–74.1109 OF THE COMMISSION'S RULES (47 C.F.R. 74.1103–74.1109, AS AMENDED)

§ 74.1103 REQUIREMENT RELATING TO DITRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS

No community antenna television system shall supply to its subscribers signals broadcast by one or more

television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially dupli-

cate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirma-

tively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon

as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 NOTIFICATION PRIOR TO THE COMMENCEMENT OF NEW SERVICE

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station car-

ried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communciations Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed

service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however,* That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

NOTE 2: As used in § 74.1105, the term "television broadcast station" includes foreign television broadcast stations.

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; OTHER PROCEDURES

(a) No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy

maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such a response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a

petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service

to new geographical areas in violation of the terms of the specified temporary relief.

(e) Within 60 days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same proceeding as the earlier requests.

NOTE 1: As used in § 74.1107, the term "television broadcast station" includes foreign television broadcast stations.

§ 74.1109 PROCEDURES APPLICABLE TO PETITIONS FOR WAIVER OF THE RULES, ADDITIONAL OR DIFFERENT REQUIREMENTS AND RULINGS ON COMPLAINTS OR DISPUTES

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state

fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify

other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

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